(3)

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 564.

BOYD L. KITHCART, PETITIONER,

VS.

METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PAUL E. BINDLEY,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

Table of Cases

Blake vs. McClung, 172 U. S. 239, l. c. 252 9
Colgate vs. Harvey, 296 U. S. 404, l. c. 431 10
General Investment Co. vs. Lake Shore & M. S. R. Co., 260 U. S. 261 10
Gibson vs. Ransdell, 188 S. W. 2d 35, l. c. 37 6
Guaranty Trust Co. of New York vs. York, 89 L. Ed. 1418, l. c. 1424 7
Ludwig vs. Scott, 65 S. W. 2d 1034 5
McGrath vs. Railway, 128 Mo. 1 2
Morley Construction Co. vs. Maryland Casualty Co., 300 U. S. 227 7
Parker vs. McClain, 229 Mo. 68 5
Propst vs. Sheppard, 174 S. W. 2d 359, l. c. 364 3
State ex rel. Bair vs. Producers Gravel Co., 341 Mo. 1106 2
Wilson & Company vs. Hartford Fire Ins. Co., 300 Mo. 1, l. c. 36-37 6

Statutes

R. S. Mo., Sec. 1012 3
R. S. Mo., 1939, Art. 9, Ch. 6, Secs. 1013, 1014 ..... 4, 5
U. S. C. A., Sec. 72 8
Constitution of the United States, Clause 2, Article VI 8
Constitution of the United States, XIVth Amendment 8, 9, 10
Constitution of the United States, Clause 2, Article IV 10

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 564.

BOYD L. KITHCART, PETITIONER,

VS.

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Respondent's brief bases its claim that the reformation suit was barred by limitations on the following erroneous mis-statements:

Page 8. "The present suit was filed on April 24, 1944, in the state court."

Page 13. "* * * this present suit was instituted on March 10, 1944."

Page 15. "Even plaintiff's so-called 'discovery' of February, 1939, * * * occurred more than five years prior to the institution of the present suit (Record 26—March 10, 1944)."

Said claim of bar is refuted by recital of Transcript 1—13008:

"Original petition filed February 24, 1944."

Said filing of the petition was the commencement of the action as against the bar of limitations. *McGrath* v. *Railway*, 128 Mo. 1.

In *State ex rel. Bair* v. *Producers Gravel Co.*, 341 Mo. 1106, it is said:

> " 'it has been held that an action is begun in a court of record when the petition is filed. This, even though summons may not thereafter be issued until the action is barred.' "

II.

Respondent's present claim is that the action is barred by Sec. 1014, R. S. Mo., 1939. But it caused the Court of Appeals to hold directly to the contrary. The opinion of the Court of Appeals holds that the limitation for reformation is 10 years, as follows (77):

> "The general limitation on suits for reformation in Missouri is 10 years. Mo. R. S. A., Sec. 1013."

On page 48 of respondent's brief filed in the Circuit Court of Appeals is the following statement:

> "The period of limitations at law in Missouri for actions on written contracts is ten years (R. S. Mo., 1939, Sec. 1013)."

But on page 17 of its brief in this Court it says:

> "Petitioner contends that this is a suit on a written contract, and that the 10 year Statute of Limiations is applicable (Sec. 1013, R. S. Mo., 1939). We have already seen that this is, in reality, an action for relief on the ground of fraud, and therefore

limited by Section 1014. It could be nothing else; * * *"

Respondent, on pages 41 and 42 of its brief, under the heading Appendix, reprints three statutes of the State of Missouri, but omits the most important one, viz.: Section 1012, which is as follows:

> "Sec. 1012. Period of limitation prescribed. Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: *Provided,* that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

The language of said statute has been construed to mean what it says, and that it is immaterial whether the inability to sustain the action is caused by fraud, or any other cause. The reformation action could never accrue until the damage was capable of ascertainment, after February 25, 1939, as stated in *Propst* v. *Sheppard,* 174 S. W. 2d 359, l. c. 364:

> "* * * plaintiffs could not have sustained a suit because the damage they sustained was not 'capable of ascertainment' and their cause of action did not accrue until that time."

Section 1012 is applicable to and prevents the accrual of any cause of action, whether based on contract, fraud, or breach of duty, until the damage is sustained by the required breach of contract or breach of duty is capable of ascertainment.

It was impossible for the damage resulting to petitioner from respondent's misrepresentations at the trial in 1933, to the effect that Denison was never in respondent's employ and was not its agent and had no authority to make the contract, until petitioner discovered on Feburary 25, 1939, that all of said representations made to the court and to petitioner were untrue, and that in truth and in fact the papers shown by the amended petition to have been attached to the application were forwarded to the home office for approval, were approved, and were signed by respondent's authorized agents. The allegations of the petition disclose that respondent prevented the commencement of the suit for reformation until after February 25th, 1939 (10-13-14-15-16-17).

On page 16 of its brief respondent claims that the allegations of the amended petition

> "* * * at most relate to matters of evidence, not of knowledge, for plaintiff's knowledge was complete in 1933, including knowledge of the claimed intention of defendant to defraud him."

The petition, however, alleges, as shown at pages 14 and 15 of the petition for certiorari, that because of the acts of respondent it caused petitioner to believe that petitioner did not have a valid contract of insurance until February 25, 1939, on which date he went to the respondent's office and, because of facts he there described, made an investigation and then, for the first time, discovered that in truth and in fact the said agents had signed said document and said type-written part of said insurance contract and forwarded same to the home office of respondent for its approval (13).

Section 1014 is not a special statute of limitations but is included in Art. 9 of Ch. 6, R. S. Mo., 1939, as one of the general statutes of limitations, which

cannot become operative until the cause of action accrues under Section 1012 and under Section 1013. For, even where an action is grounded on fraud, both of said statutes may toll the five-year provision of Section 1014 with reference to fraud. *Parker* v. *McClain,* 229 Mo. 68.

The claim that the decision in *Ludwig* v. *Scott,* 65 S. W. 2d 1034, and another case, hold that the 5 year statute applies to the reformation suit herein is untenable, for the reason that the only questions involved in these cases were actions to *cancel deeds* on the ground of fraud. Hence said decisions could not be regarded as the law under the statement of the principle known as *stare decisis,* applied by Mr. Justice Curtis of this Court in a decision which we cannot find but which is quoted by the late Joseph H. Choate in the income tax cases, as reported at page 505 of his Arguments and Addresses (1926, West Publishing Co.), thus:

> "The question is, whether this exact question has been decided before—consciously, intentionally decided before; and nobody better than Mr. Justice Curtis has expressed that rule. His statement of it is cited and relied upon in your Honors' opinion, and so, I take it, it receives the approval of the Court down to this day. It is at page 44 of the printed opinion:
>
> > 'Mr. Justice Curtis said: "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there *must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.*" '

To apply the maxim *stare decisis* to something the Court *did not decide,* nor *conceive to be involved* would be not merely wrong, but utterly unreasonable."

III.

Respondent's claim, with reference to *res judicata,* is shown to be invalid by the following statement from *Wilson & Company* v. *Hartford Fire Ins. Co.,* 300 Mo. 1, l. c. 36-37:

"Judgments held not to be a bar to another action because not rendered on the merits, after an exhaustive review of the cases by leading text-writers, as classified as follows: * * *

2. Where he has misconceived his action. * * *

5. Where the first suit was improperly brought.

6. Where the matter in the first suit is ruled out as inadmissible under the pleadings (Smith's Leading Cases 673; 1 Freeman, Judgments (4 Ed.), Sec. 263, p. 479, and cases cited),

and cases cited on page 35 of the petition for certiorari.

IV.

The law of Missouri is incorrectly stated by respondent on pages 19 and 20, with reference to limitations. It ignores the real question decided in *Gibson* v. *Ransdell,* 188 S. W. 2d 35, l. c. 37, on June 4, 1945, stating the law of Missouri as it has always been:

"(2) It is well settled that, if the *petition* shows upon its face that plaintiff's cause of action is barred by the statute of limitations, this point may be raised by demurrer. *Ludwig* v. *Scott,* (Mo. Sup.) 65 S. W. 2d 1034, 1035; *Herweek* v. *Rhodes,* 327 Mo. 29, 34 S. W. 2d 32; *Burrus* v. *Cook,* 215 Mo. 496, 503, 114 S. W. 1065; *Dennig* v. *Meckfessel,* 303

Mo. 525, 261 S. W. 55, 58. But the *particular statute* relied upon must be pointed out. *Knisely* v. *Leathe,* 256 Mo. 341, 359, 166 S. W. 257."

The latest decision of this Court on the question, to-wit: that in *Guaranty Trust Co. of New York* v. *York,* 89 L. Ed. 1418, l. c. 1424, holds that if a litigant waives the particular statute of limitations on which he relies by failing to plead it, then it is waived forever and must be so regarded in the federal as in the state courts. The following is the language of this Court:

> "The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there.[5]
>
> 5. "The statute may be waived, *Peoples Trust Co.* v. *O'Neill,* 273 N. Y. 312, 316, 7 N. E. 2d 244, and must be pleaded, *Dunkum* v. *Maceck Bldg. Corp-* 227 App. Div. 230, 237 N. Y. S. 180."

V.

Respondent claims that since it alleged that the petition failed to state a claim, then that limitations could be raised by motion to dismiss, on the theory that a general demurrer would lie, has no application for the reason that the District Court correctly stated what the issues involved were (last Par. 49 of Abstract). And in the first paragraph after that (50) the petition contained a small "needle" consisting of a statement of a cause of action or valid claim.

Since respondent did not appeal from that holding, he cannot be heard to urge that the petition failed to state a claim. *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 227.

VI.

The claim that Congress can, by the enactment of Sec. 72, U. S. C. A., authorizing removal of suits

> "* * * except suits removable on the ground of prejudice or local influence"

authorize the artificial person known as the respondent, by filing a petition and bond, compel the State court, in a suit brought by a citizen of the United States, to comply with the command of the act of Congress that

> "It shall then be the duty of the State court to accept said petition and bond and proceed no further in said suit"

is merely a contention that an act of Congress can relieve a State court of its obligation to obey Clause 2 of Article VI of the Constitution of the United States, providing that

> "This Constitution and the laws enacted pursuant thereto shall be the supreme law of the land, and the judges in every State shall be bound thereby."

On page 38 of its brief respondent admits that the petitioner is a citizen of the United States and says:

> "Petitioner is a 'citizen of the United States,' only to the extent and purpose that a *State* (not the Acts of Congress) may not take away his 'privileges and immunities' by the *passage and enforcement of any state law.*"

The italicized language in the above sentence is not the language of Section 1 of the XIVth Amendment, for that language is

> "No State shall make or enforce any law * * *"

The respondent uses the word "and" in lieu of the word "or" in the Constitution, and respondent inserts the word "state" between the words "in" and "law" in said sentence, while there is no such qualifying word in the Constitution.

The claim on page 38 that petitioner's right as a citizen of the United States to institute and maintain a suit in a State court is not derived from the Constitution and laws of the United States, and therefore not protected by the XIVth Amendment. *Blake* v. *McClung*, 172 U. S. 239, says, l. c. 252:

> "* * * the object of the constitutional guaranty was to confer on the citizens of the several states 'a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions.'
>
> The principles have not been modified by any subsequent decision of this court."

Respondent's contention is that Congress is given power to compel a State to violate the privileges and immunities clause of the XIVth Amendment by compelling it to deny to a citizen of the United States the right either to institute or maintain a suit against a non-resident citizen. But the XIVth Amendment itself, by Section 5 thereof, limits the power of the Congress to legislation *enforcing* same. Thus:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

On page 38 respondent says:

> "If the question here were one involving the right of a citizen of some other state to use the courts of Missouri, then a question under the Fed eral Constitution might arise."

The above statement by respondent is in conflict with *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261.

Since the right of the citizens generally to bring a suit in a State court was regarded as a privilege and an immunity of the general citizens of the country under Clause 2 of Article IV of the Constitution from the beginning, then, under the interpretation placed on the XIVth Amendment by this Court in *Colgate* v. *Harvey*, 296 U. S. 404, and the cases cited therein, those privileges and immunities now belong to citizens of the United States as such, and cannot be denied by the court of any State, even if required to do so by an act of Congress. And this, because the Constitution is the supreme law. This Court there said, l. c. 431:

> "The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to abridge the gap left by that article so as also to safeguard citizens of the United States."

Respectfully submitted,

PAUL E. BINDLEY,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.